86-331

Supreme Court, U.S.
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AUG 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, [redacted] 1985

No. 85-[redacted]

ANDREW AMPLO,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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JOHN LEVENTHAL,
Of Counsel.

QUESTION PRESENTED

1. Did the District Court err in denying Petitioner's motion to withdraw his guilty plea in the face of a showing that his counsel and counsel for a co-defendant who had been recommended by Petitioner's trial counsel had an undisclosed fee splitting arrangement?

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APPENDIX

Decision of the United States Court of Appeals for the Second Circuit Dated June 26, 1986 ..... 1a

Oral Decision of the District Court 4a

IN THE

Supreme Court of the United States

October Term, [redacted] 1985

No. [redacted]

ANDREW AMPLO,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Andrew Amplo respectfully prays that a Writ of Certiorari be issued to review the order of the Court of Appeals for the Second Circuit entered in this case on or about June 26, 1986, which affirmed a judgment of the United States District Court, Eastern District of New York (Sifton, J.) entered on March 13, 1986.

Opinions Below

The opinion of the Court of Appeals is unreported and appears as Appendix A to this Petition. The Court of Appeals in its June 26th order affirmed a judgment of the United States District Court, Eastern District of New York (Sifton, J.) convicting Petitioner of conspiracy to

commit mail fraud and one substantive mail fraud count. Judge Sifton's oral decision denying Petitioner's motion to withdraw his guilty plea is reproduced in Appendix B to this Petition.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. 1254. This Petition for a Writ of Certiorari is filed within sixty (60) days of the Court of Appeals affirmance of the judgment of conviction.

Question Presented

1. Did the District Court err in denying Petitioner's motion to withdraw his guilty plea in the face of a showing that his counsel and counsel for a co-defendant who had been recommended by Petitioner's trial counsel had an undisclosed fee splitting arrangement?

Constitutional Provision Involved

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions the accused shall have the assistance of counsel for his defence."

Statutory Provisions Involved

Rule 32(d) of the Federal Rules of Criminal Procedure states:

> "If a motion for withdrawal of a plea of guilty of nolo contendere is made before sentence is imposed, imposition of sentence is suspended, or disposition is had under 18 U.S.C. 4205(c), the Court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason. At any later time, a plea may be set aside only on direct appeal under 28 U.S.C. 2255.

Rule 44(c) of the Rules of Criminal Procedure states:

> (c) Joint representation. Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsels who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is a good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel. (As amended April 30, 1979, eff. Dec. 1, 1980.)

Statement of Facts

The Petitioner Andrew Amplo was charged in an indictment * returned by a Federal Grand Jury sitting in the Eastern District of New York with seven co-defendants with conspiracy to commit mail fraud (18 U.S.C. 371) and substantive mail fraud (18 U.S.C. 1341) in connection with an alleged scheme to defraud insurance companies by making or causing to have made false statements in various claim forms filed with the insurance carriers.

Petitioner and his co-defendants were arraigned upon the indictment in the District Court, entered pleas of "not guilty" and were released pending trial before District Judge Charles P. Sifton.

---

* Petitioner was charged in nine of the seventeen counts alleged in Eastern District indictment number 85 Cr. 250-1.

At the time that the federal charge was filed, Petitioner was already facing an indictment filed in the New York State Courts (Kings County) in which he and a co-defendant Vincent Bonafede were charged. With the permission of the State Court Judge, both petitioner and the co-defendant Bonafede were represented by the same privately retained law firm of Zerin & Cooper, Esqs.

During the pre-trial discovery phase of the federal criminal action it was determined that it would be inappropriate for the Zerin & Cooper firm to represent both the Petitioner and his co-defendant Bonafede in the Eastern District case. Accordingly, Zerin & Cooper brought in Michael Washor, Esq., a partner in the law firm of Washor, Greenberg & Washor to represent Vincent Bonafede.

Unbeknownst to Petitioner and the *nisi prius* Court, the Zerin and Washor firms had agreed between themselves to equally divide all moneys received by Petitioner and Bonafede on a "50-50" basis. From this point on, Mr. Washor took command of the defenses and conducted all discussions with the United States Attorney's Office in an effort to arrive at a plea agreement which would moot the necessity of a complex and time consuming trial.

To that end, on August 19, 1985, Petitioner pleaded guilty before Judge Sifton to two counts* of the indictment under a plea agreement in which the United States Attorney's Office qualified its acceptance of the plea upon the entry of guilty pleas by all of the charged defendants.

Prior to accepting Petitioner's plea the Court complied with the requirements of Rule 11 of the Federal Rules of Criminal Procedure and found the existence of a factual basis for accepting Petitioner's guilty plea after

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* One conspiracy count and one substantive mail fraud count.

being advised that Petitioner agreed with the other defendants to share in the proceeds of the falsely filed insurance claims and was aware that the accidents for which payment was applied had not in fact occurred.

On October 25, 1985, Petitioner appeared before Judge Sifton for sentence with Louis R. Rosenthal, Esq., having discharged the Zerin & Cooper firm. In the light of statements made by Petitioner which were inconsistent with his plea posture, the District Court declined to procede to impose sentence but, rather, indicated that *inter alia* that if Petitioner's position had changed, a formal motion to withdraw the previously entered guilty plea should be filed.

On January 23, 1986, the motion to withdraw the guilty plea was filed essentially asserting that his plea was coerced by counsel to protect the co-defendant Bonafede who, unlike Petitioner, did not have a triable case. The District Court then received affiidavits from Petitioner, Mr. Zerin, Mr. Washor and the Government and on March 3rd and 4th took testimony in connection with the plea withdrawal motion.

The sworn testimony at the hearing confirmed that Petitioner had been a client of the Zerin & Cooper firm prior to the filing of the federal indictment but that he and his co-defendant Bonafede had waived their right to be separately represented in connection with the State Court matter. Defendant Bonafede's attorney was obtained by the Zerin & Cooper firm, but the fee splitting arrangement reached between the two sets of attorneys was not disclosed to Petitioner.

Mr. Zerin and Amplo discussed the evidence which the Government possessed prior to coming to Court to plead guilty. Neither Mr. Zerin nor his partner Mr. Cooper, participated in the plea discussions with the United States Attorney's Office although after the framework for the

plea agreement and the nature of the upcoming court appearance with Amplo prior to the court appearance.

It was contended by Mr. Washor that on the date of the plea, when a co-defendant Lombardo balked at entering a guilty plea, Petitioner allegedly interceded to induce him to go along with the "package deal".

Judge Sifton found that Petitioner's plea was voluntary and not the product of undue pressure from either Petitioner's attorney or the attorney for Bonafede. In addition, the Court while noting that Petitioner protested that he was "innocent", that this contention was "conclusory":

> The fact that the firm of Zerin and Cooper represented the defendant and Mr. Bonafede in a state felony proceeding, at the same time as his plea here does not—particularly given the very slight information I am given concerning the proceeding —demonstrate an actual conflict of interest.
>
> The waiver of any conflict before the state judge is of some significance. But most particularly, I am not shown in any way how that joint representation in another proceeding affected in any way Mr. Zerin's ability to represent his client in this proceeding, in which Mr. Zerin only had Mr. Amplo's interest in mind and no obligation with respect to Mr. Bonafede's defense (A. 178, 179).

The District Court also was not troubled by Zerin's and Washor's fee arrangement. The Court found:

> The fact that Mr. Bonafede's attorney, Mr. Washor, came into the case as a result of Mr. Zerin's introduction obviously doesn't demonstrate a conflict of interest. Nor does the fee arrangement apparently conflict wherein Mr. Amplo's fee, or at least half

> of it stood as security for Mr. Bonafede's payment to Mr. Washor.
>
> I have not been shown any . . . circumstances which would suggest that Mr. Zerin's conduct was in any way influenced by his agreement . . . (A. 179-180).

This District Court concluded that Amplo's motion was no more than an attempt to get out of a deal he had freely and knowingly entered into simply because he was unhappy with the sentence he was likely to receive. In denying Amplo's motion, the District Court stated:

> I am going to deny the application which (sic) can only conclude is an application that was stimulated by the fact that sentence have been imposed on the co-defendants, and in light of those sentences, the defendant has reconsidered his earlier decision to plead guilty. (A. 180).

Following Judge Sifton's imposition of sentence, Petitioner appealed his conviction to the Court of Appeals for the Second Circuit. In an unpublished memorandum order (A. 1-3) the Court unanimously affirmed Petitioner's conviction.

Reason For Granting The Writ

I.

In Light Of The Fee-Splitting Relationship Between Petitioner's Counsel And Counsel For A Co-Defendant The District Court Erred In Denying Petitioner's Motion To Withdraw His Guilty Plea.

The Sixth Amendment right to effective assistance of counsel encompasses the right to representation by an attorney who does not owe conflicting duties to any other

defendants. *Holloway* v. *Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 LEd.2d 426 (1978).

Multiple representation of defendants by the same attorney is always viewed with concern by the courts because of the potential for conflict of interest. While actual conflict of interest between two criminal defendants can be waived, *United States* v. *Armedo-Sarmiento*, 524 F.2d 591 (2d Cir. 1975); *United States* v. *Garcia*, 517 F.2d 272, 275 (5th Cir. 1975), that waiver must be an intentional relinquishment or abandonment of a known right and done with the awareness of the relevant circumstances and likely consequences. See e.g., *Johnson* v. *Zerbst*, 304 U.S. 458, 58 S.Ct. 1019 (1938); *United States* v. *Blum*, 753 F.2d 999, 1006 (11th Cir. 1985); *Lace* v. *United States*, 736 F.2d 48, 50 (2d Cir. 1984).

In *United States* v. *Carrigan*, 543 F.2d 1043 (2d Cir. 1976) the Court reversed the conviction of two defendants who were represented by the same attorney at trial. In reversing, the Second Circuit found that:

> The law in this Circuit is clear. When a potential conflict of interest arises, either where a court has assigned the same counsel to represent several defendants or where the same counsel has been retained by co-defendants in a criminal case, the proper course of action for the trial judge is to conduct a hearing to determine whether a conflict exists to the degree that a defendant may be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the Sixth Amendment. The defendant should be fully advised by the trial court of the facts underlying the potential conflict and be given the opportunity to express his views. (Citations omitted.)

Since *United States* v. *Carrigan, supra*, the Federal Rules of Criminal Procedure (FRCP) have been

amended, with rule 44(c) being added. This statute reads as follows:

> (c) Joint representation. Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is a good cause to believe no court shall take such measures as may be appropriate to protect each defendant's right to counsel. (As amended April 30, 1979, eff. Dec. 1, 1980).

It is clearly within the District Court's power to "nip any potential conflict of interest in the bud." *United States* v. *Gopman*, 531 F.2d 262, 266 (5th Cir 1976); *Tucker* v. *Shaw*, 378 F.2d 304, 307 (2d Cir. 1967).

Even when a defendant opposes disqualification of his attorney, the District Court must take the necessary steps to impart to the defendant a full understanding of the consequences of the decision—the individual's comprehension of the situation and its implications. *United States* v. *Mahar*, 550 F.2d 1005, 1007 (5th Cir. 1977). It is the affirmative duty of the trial judge to insure that criminal defendants are not deprived of their Sixth Amendment right of effective assistance of counsel in the light of considerations which as lay people they do not perceive for this reason.

It is important that the trial judge ascertain whether the effective and fair administration of justice would be adversely affected by *continued* joint representation, even where an actual conflict is not *then clearly* apparent.

In an appropriate case the Court may order the defendant to be represented by independent counsel. See *United States* v. *Bernstein*, 533 F.2d 775, 787-789 (2d Cir. 1976) [One factor considered by court was co-defendant was underwriting defendant's defense; this readily apparent conflict could be seen by Court to indicate significant probability of prejudice].

When one attorney represents multiple defendants, plea bargain negotiations are fraught with danger of conflicts of interest. See "Conflict of Interests and Multiple Defendants in a Criminal Case; Professional Responsibilities of a Defense Lawyer," 62 Minn. L. Rev. 119 (1978) and *United States* v. *Troglio*, 493 F.2d 574 (4th Cir. 1974). [Defendant's interests were so commingled with those of four co-defendants that it was impossible for joint counsel to devote full efforts on behalf of defendant and that it was an abuse of discretion of trial court to deny defendant's motion to withdraw plea pursuant to plea bargain between prosecution and all five defendants].

Even after the addition of Rule 44(c) to the FRCP, the Courts retained the power to disqualify joint counsel even in the face of a purported "waiver" by defendants. *United States* v. *Flanagan*, 679 F.2d 1072 (3d Cir. 1982) rev'd on other grounds 104 S.Ct. 1051, (1984) [Trial Court did not abuse its discretion in disqualifying joint counsel for criminal defendants where conflict of interest was very likely to arrive in course of proceedings, even though it found that each defendant was completely aware of potential conflict of joint representation and that each defendant had voluntarily and intelligently chosen to waive any claim of conflict of interest in electing to be represented by one counsel].

In order to establish a violation of the Sixth Amendment, a defendant who has alleged the existance of an actual conflict situation need not prove actual prejudice

(*Baty* v. *Balkom*, 661 F.2d 391 [5th Cir.] *cert.* den. 456 U.S. 1011 [1981]; *United States* v. *Winkle*, 722 F.2d 605, 610 [10th Cir. 1983] for under such circumstances prejudice will be presumed; *Cuyler* v. *Sullivan*, 446 U.S. 335, 348, 100 S. Ct. 1708, 1718, [1980]).

In the case at bar, Petitioner was represented by the same counsel as the co-defendant Bonafede in a state criminal felony at the time of his plea. This law firm, Zerin and Cooper, also represented defendant in the District Court at the time of his plea. Mr. Bonafede's Federal Court attorney, Mr. Washor, was hired by the defendant's attorneys and met with the defendant in the offices of Zerin and Cooper and, together with Mr. Zerin, convinced him to plead guilty in order to help Mr. Bonafede, as the United States Attorney would only accept Mr. Bonafede's plea if all the defendants would likewise plead guilty.

The manner of retainer and payment of the attorneys (proceeds pooling and splitting) for Petitioner Amplo and Bonafede and the appointment of Mr. Washor as chief negotiator for a group of defendants caused and furthered an irrecovable conflict between defendants and counsel. For the first time, at the hearing, it was revealed, and Amplo was to learn, that if Bonafede didn't pay his fee, one half the money Amplo paid would go to Bonafede's lawyer and vice versa. See *United States* v. *Bernstein*, *supra*. It appears, that Mr. Zerin, rather than tell Mr. Bonafede to independently obtain a different lawyer, *subcontracted* the case of co-defendant Bonafede to Mr. Washor. The plea package, while beneficial to a guilty defendant such as Bonafede was not beneficial to Petitioner who believed he had a triable case.

The Sixth Amendment right to effective assistance of counsel emcompasses the right to representation by an attorney who does not owe conflicting duties to other defendants. *Holloway* v. *Arkansas*, *supra*. While the

arrangement of having a single attorney conduct disposition negotiations on behalf of several defendants may not standing alone be violative of the defendant's right to counsel *per se* (see *United States* v. *Troglio, supra*), the fact that Bonafede's attorney undertook the task to "convince" Petitioner to accept the plea bargain so that Bonafede and the other defendants would not have to go to trial, raises we think, the appearance of an actual conflict.

Indeed, it is the recognition that counsel can owe or feels he owes duties to another party whose interests may be adverse to the client when he represents which establishes the existence of an actual conflict (*Zuck* v. *Alabama*, 588 F.2d 436, 439 [5th Cir 1979]). Hence the creation of a mechanism through which the constitutional right to counsel is premised upon benefactor payments by a third party, pose the obvious danger that the attorney recipient will place the interests of the benefactor before that of the beneficiary client, or at least will consider as factors in the impact of what advice he renders against the impact that it may or will have against the benefactor (*Wood* v. *Georgia, supra;* see also *United States* v. *Castellano*, 610 F. Supp. 1151, 1163 [S.D.N.Y. 1985]).

The importance of this Petition, we submit, is that it pointedly raises the conflicts caused by jointly funded criminal defenses where full disclosure is not made by the attorneys to the Court of the defendants. Indeed, this Court in *Wood* v. *Georgia*, 450 U.S. 261, 101 S.Ct. 1097 [1981] in an opinion by Mr. Justice Powell, recognized the conflicts of interest which exist where an accused has his legal fees paid by a third party. There clearly could be no question subsequent to the decision in *Wood* that the manner and mode of such benefactor payments can serve as proverbial "thumb on the scale" and distort the engagement in proper advocacy by reason of who and how the fees are paid, or that a violation of due process was the result.

At a time when the fact and extent of plea bargaining is now well known, and has come out of the Courthouse closet (see *Santobello* v. *New York*, 404 U.S. 257, 92 S.Ct. 495 [1971]) the impact upon fee arrangements among criminal accused can have a greater impact in cases which never procede to trial than those which are fully litigated to verdict. Indeed, the very vice presented here is that the nature of the undisclosed fee splitting relationship caused one accused who sought a long and expensive (particularly to counsel) trial, to forego that right because his co-defendant faced nothing less than a testimonial massacre if a trial were held. The conflict then impacted far greater for the coercive powers favoring a joint plea took precedence over a long, expensive time consuming trial which would have been less remunerative to counsel.

To the extent that the impact of fee arrangements of this type *viz a viz* the Sixth Amendment right to counsel have not been explored we think this case raises issues for which the trial level Courts require guidance from this Court. Accordingly, the Writ should issue and plenary consideration of the issue raised be accorded.

Since at the sentencing stage of the proceedings an actual conflict was apparent, the District Court was, we respectfully submit, obliged to fashion a remedy calculated to make Petitioner whole for the alleged violation that Petitioner alleged in his innocence (c.f. *Hill* v. *Lockhart*, — U.S. —, 106 S.Ct. 366 [1986]) and no overriding prejudice was properly demonstrated by the Government provided a proper basis for restoration of the plea.

Mindful that the drafters of Rule 32(d) intended that the rule be construed liberally and thereby codified the standard of *Kercheval* v. *United States*, 274 U.S. 220, 224, 47 S.Ct. 582, 583 [1927] we believe that the District Court failed to apply this liberal standard in assessing Petitioner's plea withdrawal application. Indeed, to

characterize his claim of innocense as "conclusory" is to impose a harsher standard than Rule 32(d) contemplated. In actuality all such pleas of "not guilty" are conclusory, but are all that is required to trigger a due process protected trial. To expect more, before the Government, puts in a case is naive if not duplicitous.

Finally, there was no real showing of compelling prejudice by the Government. While, it is true that the United States Attorney's Office could not subpoena the co-defendants to trial, the same could realistically be said of the Petitioner—and indeed if the co-defendants had not pleaded—they still could not be called. Simply put, we think that the allegation of Governmental prejudice was simply a "make weight" proferred by the Court masking judicial irritation at a plea gone awry. That irritation, understandable as it may be, falls short of the proper recognition for Petitioner's plight and the existence of a remedy.

CONCLUSION

For the reasons stated, we respectfully pray that a writ of certiorari to review the judgment of the United States Court of Appeals be graned.

Dated: New York, New York
August 21, 1986

Respectfully submitted,

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APPENDIX

Order

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 86-1061, 1134

FILED

JUNE 26 1986

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANK PIGNATELLI and ANDREW AMPLO,

Defendants,

ANDREW AMPLO,

Defendant-Appellant.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-sixth day of June, one thousand nine hundred and eighty-six.

Present:

HONORABLE RALPH K. WINTER,
HONORABLE GEORGE C. PRATT,
Circuit Judges,
HONORABLE HERBERT N. MALETZ,*
Judge.

* The Hon. Herbert N. Maletz, Judge, United States Court of International Trade, sitting by designation.

Order

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

Appellant Amplo seeks to withdraw his guilty plea on the grounds that he was denied his sixth amendment right to effective assistance of counsel. After a full evidentiary hearing on the motion to withdraw the guilty plea, the district court found no evidence to support Amplo's claims that his plea was involuntary or that his counsel had a conflict of interest. Moreover, the court refused to credit Amplo's claim of innocence, finding it "conclusory in the extreme." We have reviewed the record and conclude that the district court's findings are not clearly erroneous. The district court's decision denying Amplo's motion to withdraw his guilty plea was thus well within that court's discretion. *United States* v. *Figueroa*, 757 F.2d 466, 475-76 (2d Cir.), *cert. denied*, 106 S. Ct. 122 (1985).

Amplo also maintains that his sentence should be reduced because he was sentenced more harshly than his co-defendants. However, a sentence that is within the statutory maximum is not subject to challenge on the ground of severity simply because other defendants received lesser sentences. *United States* v. *Bonnet*, 769 F.2d 68, 71 (2d Cir. 1985); *United States* v. *Mennuti*, 679 F.2d 1032, 1037 (2d Cir. 1982).

Order

The judgment of the district court is thus affirmed.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

RALPH K. WINTER,

/s/ .....

RALPH K. WINTER, *U.S.C.J.*

GEORGE C. PRATT,

/s/ .....

GEORGE C. PRATT, *U.S.C.J.*

HERBERT N. MALETZ,

/s/ .....

HERBERT N. MALETZ, *U.S.J.*

Decision

THE CLERK: Criminal motion, United States against Andrew Ampolo.

Please come forward.

THE COURT: Is there anything further either side wants to present?

MR. ROSENTHAL: The defendant has nothing further. We will rely on our memorandum of law.

MR. MAAS: The Government has nothing to add, your Honor.

THE COURT: I will deny the application of the defendant to withdraw his plea of guilty because I find it is without basis factually or as a matter of law.

The two grounds for withdrawal of the plea which are inter-related is that the defendant now asserts his innocence to crimes to which he pleaded guilty and that he was deprived of the effective assistance of counsel at the time the plea was entered.

With regard to the defendant's protestations of innocence, it is pointed out in the Government's papers and response that they are conclusory in the extreme. And to the extent they are tied to time and place hardly suffice to explain the periods of time that are covered by the plea.

With regard to the claim of ineffective assistance of counsel, namely, Mr. Zerin, I don't credit the statements made that Mr. Zerin or Mr. Washor, or for that matter, anybody else, told this defendant that he had to plead guilty; that he had no other option or that he was otherwise subjected to threats or pressure which resulted in this plea.

Decision

The statements with regard to his matrimonial situation do not persuade me that he acted under threat or compulsion, particularly in the light of his sworn statements to me to the contrary at the time his plea was accepted.

The fact that the firm of Zerin and Cooper represented the defendant and Mr. Bonafede in a state felony proceeding at the same time as his plea here does not—particularly given the very slight information I am given concerning that proceeding —demonstrate an actual conflict of interest.

The waiver of any conflict before the state judge is of some significance. But most particularly, I am not shown in any way how that joint representation in another proceeding affected in any way Mr. Zerin's ability to represent his client in this proceeding, in which Mr. Zerin only had Mr. Ampolo's interest in mind and no obligations with respect to Mr. Bonafede's defense.

The fact that Mr. Bonafede's attorney, Mr. Washor came into the case as a result of Mr. Zerin's introduction obviously doesn't demonstrate a conflict of interest. Nor does the fee arrangement apparently conflict wherein Mr. Ampolo's fee, or at least half of it, stood security for Mr. Bonafede's payment of Mr. Washor.

I have not been shown any evidence that would suggest that Mr. Bonafede or Mr. Ampolo were aware of these arrangements, or any circumstances which would suggest that Mr. Zerin's conduct was in any way influenced by his agreement that in the event that Mr. Bonafede didn't pay what was owing from Mr. Bonafede to Mr. Washor, that a portion of Mr. Ampolo's fee would be paid to Mr. Washor.

Decision

For all those reasons I am going to deny the application which can only conclude is an application that was stimulated by the fact that sentences have been imposed on other co-defendants, and in the light of those sentences the defendant has reconsidered his earlier decision to plead guilty.

Are you ready to proceed to sentence?

MR. ROSENTHAL: Your Honor, we are ready, and I would rest insofar as any statement was made. I don't know if your Honor recalls the statement I made with respect to Mr. Ampolo initially that we were ready for sentence.

But, again, I would reiterate, your Honor, that his acts as far as I could determine were more acts of omission than commission. In that for a good part of this time he said he was in New Jersey running a different aspect of the business, and his partner actually ran the actual claims part of the business with respect to damage to automobiles. In fact when he did find out through a secretary that this was happening he came back and put an end to it.